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ALEXANDER L. STEVAS,
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No. 82-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the pendency of a proposed class action toll the running of the ninety-day statutory period for the commencement of a Title VII suit, so that Respondent Parker, as a putative class member, may file a separate, private Title VII action after certification of the putative class has been denied?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	v
Opinions and Judgments Below	1
Jurisdiction	1
Statutory Provision and Federal Rule Involved	2
Statement of the Case	2
Summary of Argument	4
Argument	6
I. THE FOURTH CIRCUIT RULE EXTENDING THE *AMERICAN PIPE* TOLLING DOCTRINE IS NOT SUPPORTED BY PRECEDENT	6
A. The *American Pipe* Rule Clearly and Specifically Restricts Tolling to Timely Intervention	7
B. The Authorities Relied Upon by the Fourth Circuit Do Not Support its Present Rule	10
II. THE *AMERICAN PIPE* TOLLING RULE WAS ESTABLISHED TO EFFECTUATE THE PURPOSES OF RULE 23 AND NOT TO FURTHER THE INTERESTS OF PRIVATE LITIGANTS	12
A. The American Pipe Tolling Rule was Established for the Narrow Purpose of Preserving the Effectiveness of Rule 23	13
B. An Important Purpose is Served in Limiting the Tolling Doctrine to Putative Class Members who Intervene in the Proposed Class Action	17

TABLE OF CONTENTS—Continued

	Page
III. THE FOURTH CIRCUIT TOLLING RULE IS AN IMPROPER INCURSION UPON LEGISLATIVELY ENACTED STATUTES OF LIMITATION	19
A. Tolling of Limitations is Available Only When Consistent with Legislative Purpose	19
B. The Operation of the Fourth Circuit Rule Will Substantially Undermine the Purpose and Effect of Statutes of Limitation	23
IV. THE FOURTH CIRCUIT TOLLING RULE DOES NOT APPLY BECAUSE THE NINETY-DAY FILING PERIOD PRESCRIBED BY 42 U.S.C. § 2000e-5(f)(1) IS A JURISDICTIONAL PREREQUISITE AND NOT A STATUTE OF LIMITATION	24
Conclusion	26
Appendix A—Complaint, *Pendleton v. Crown, Cork & Seal Co., Inc.*, No. M-78-1734 (D.Md. filed September 15, 1978)	1a
Appendix B—Memorandum and Order Dated September 4, 1980, *Pendleton v. Crown, Cork & Seal Co., Inc.*, No. M-78-1734 (D.Md. filed September 15, 1978)	7a
Appendix C—Memorandum and Order Dated April 16, 1981, *Pendleton v. Crown, Cork & Seal Co., Inc.*, No. M-78-1734 (D.Md. filed September 15, 1978)	18a

TABLE OF AUTHORITIES

CASES Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 21, 25
American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 4-20, 22
Anderson v. Wilson, 289 U.S. 20 (1933) 20
Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978) 24
Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) 8
Bronze Shields, Inc. v. New Jersey Dep't of Civil Service, 667 F.2d 1074 (3d Cir. 1981) 21
Browder v. Director, Dep't of Corrections of Illinois, 434 U.S. 257 (1978) 26
Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 19
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) .. 10-12
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 21
Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir. 1973) 24
Gluck v. Amicor, Inc., 487 F.Supp. 608 (S.D.N.Y. 1980) 9
Goodman v. City Products Corp., 425 F.2d 702 (6th Cir. 1970) 24
Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982) 25
Gramby v. Westinghouse Electric Corp., 84 F.R.D. 655 (E.D. Pa. 1979) 9
Green v. United States Steel Corp., 481 F.Supp. 295 (E.D. Pa. 1979) 9
Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) 17
Haas v. Pittsburg National Bank, 526 F.2d 1083 (3d Cir. 1975) 10
Hinton v. CPC International, Inc., 520 F.2d 1312 (8th Cir. 1975) 24
In re Fine Paper Litigation, 632 F.2d 1081 (3d Cir. 1980) 12
Int'l Union of Elec., Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) .. 21-22

TABLE OF AUTHORITIES—Continued

Page

Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992 (11th Cir. 1982) 25
Jefferson v. H.K. Porter Co., 648 F.2d 337 (5th Cir. 1981) 9
Love v. Pullman Co., 404 U.S. 522 (1970) 25
Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943) 26
McCarthy v. Kleindienst, 562 F.2d 1269 (D.C. Cir. 1977) 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 25
Nelson v. United Credit Plan, Inc., 77 F.R.D. 54 (E.D. La. 1978) 9
Parker v. Crown, Cork & Seal Co., 677 F.2d 391 (4th Cir. 1982) 1, 3-4, 6, 8, 10, 12, 17, 23, 26
Parker v. Crown, Cork & Seal Co., 514 F.Supp. 122 (D.Md. 1981) 1-3, 9, 26
Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982)... 8-9, 11
Pendleton v. Crown, Cork & Seal Co., No. M-78-1734 (D.Md. filed Sept. 15, 1978) 3-5, 10, 22-23
Rice v. New England College, 676 F.2d 9 (5th Cir. 1982) 25
Sanders v. Faraday Laboratories, Inc., 82 F.R.D. 99 (E.D.N.Y. 1979) 9
Sanders v. John Nuveen & Co., 524 F.2d 1064 (7th Cir. 1975) 9
Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1977) 9
Smith v. American President Lines, Ltd., 571 F.2d 102 (2d Cir. 1978) 21
Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977)..... 8
Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978) 12
United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) 24-25
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 5, 7-8, 11-12, 15-17, 22
United States v. Kubrick, 444 U.S. 111 (1979)..... 19

TABLE OF AUTHORITIES—Continued

	Page
United States v. Marion, 404 U.S. 307 (1971)	19
United States v. Robinson, 361 U.S. 220 (1960)	26
United States v. Rutherford, 442 U.S. 544 (1979)	19-20
Wachovia Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980)	9
Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975)	24
Wood v. Carpenter, 101 U.S. 135 (1879)	19
Zipes v. Trans World Airlines, Inc., —— U.S. ——, 102 S.Ct. 1127 (1982)	6, 21-22, 24-25
STATUTES	
28 U.S.C. § 1254	2
28 U.S.C. § 2107	26
42 U.S.C. § 2000e	2-3, 20-21, 24
RULES	
Fed. R. App. P. 4	26
Fed. R. Civ. P. 23	2-3, 5, 7, 10-18, 23
Fed. R. Civ. P. 24	4, 18, 22
MISCELLANEOUS	
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)	26

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BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is reported at 677 F.2d 391 (4th Cir. 1982) and is reproduced at p. 1a of the Petition for a Writ of Certiorari. The Judgment of the Court of Appeals for the Fourth Circuit may be found at J.A. 13A.

The Opinion of the District Court for the District of Maryland is reported at 514 F.Supp. 122 (D.Md. 1981) and is reproduced at p. 8a of the Petition for a Writ of Certiorari. The Judgment of the District Court may be found at J.A. 12A.

JURISDICTION

The Judgment of the Court of Appeals (J.A. 13A) was entered on April 23, 1982. The Petition for a Writ

of Certiorari was filed on July 21, 1982 and was granted on November 8, 1982. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND FEDERAL RULE INVOLVED

1. 42 U.S.C. § 2000e-5(f)(1) is reproduced at p. 17a of the Petition for a Writ of Certiorari.

2. Rule 23 of the Federal Rules of Civil Procedure is reproduced at p. 18a of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. The Parker Case.

Respondent Parker, a black male, was discharged from his employment with Petitioner Crown, Cork & Seal Company, Inc.* (hereinafter "Crown") on July 15, 1977. On October 3, 1977, Parker filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging racially discriminatory harassment and discharge by Crown. In a letter dated November 9, 1978, the EEOC issued a determination that there was no probable cause to believe that Parker's charge of discrimination against Crown was true (J.A. 5A), and on the same date issued to Parker a "notice of right-to-sue." (J.A. 7A). Parker received that notice of right-to-sue but did not file suit within the ninety-day period prescribed under 42 U.S.C. § 2000e-5(f)(1).

On October 27, 1980, Parker filed the present Title VII action in the United States District Court for the District of Maryland alleging that Crown discriminatorily harassed and discharged him on account of his race. The jurisdiction of the district court was invoked under Title

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* Petitioner sent to the clerk's office of this Court a letter dated July 22, 1982, pursuant to the requirements of Rule 28.1 of the Rules of the Supreme Court.

VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, *et seq.* On November 26, 1980, Crown filed its answer denying Parker's allegations of discrimination and on March 27, 1981, moved for summary judgment. In its motion, Crown asserted that nearly two years had passed since Parker received his ninety-day notice of right-to-sue, and therefore, Parker had not satisfied a jurisdictional prerequisite to the commencement of his suit. In a Memorandum and Order filed April 20, 1981, the District Court granted Crown's motion for summary judgment. (Petition for Cert. at 8a). Judgment was entered on April 22, 1981. (J.A. 12A). Parker appealed that judgment to the United States Court of Appeals for the Fourth Circuit. In an Opinion dated April 23, 1982, the United States Court of Appeals for the Fourth Circuit reversed the District Court and remanded the case. (Petition for Cert. at 1a).

B. The Pendleton Case.

On September 15, 1978, two discharged black employees, Pendleton and Allen, filed a Title VII class action in the United States District Court for the District of Maryland, *Pendleton v. Crown, Cork & Seal Co.*, Civil No. M-78-1734 (D.Md.), on their own behalf, and on behalf of all similarly situated black persons, alleging racial discrimination by Crown in various employment practices, including harassment and discharge. (App. A to Petitioner's Brief at 2a). On May 31, 1979, the *Pendleton* plaintiffs moved to certify a class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, consisting of all black persons who could have filed a charge of racially discriminatory practices, including harassment and discharge, against Crown on or after March 31, 1973. By a Memorandum and Order dated September 4, 1980, and after an evidentiary hearing, the District Court denied that motion for class certification. (App. B to Petitioner's Brief at 17a).

On February 26, 1981, a stipulated order of dismissal with prejudice was signed by the District Court as the result of a settlement of the remaining individual claims of Pendleton and Allen.

On March 30, 1981, Parker filed a motion, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene in the *Pendleton* case, for purposes of filing an appeal of the denial of class certification. The District Court, in a Memorandum and Order dated April 16, 1981, granted Parker's motion to intervene. (App. C to Petitioner's Brief at 20a). Thereafter, on May 14, 1981, Parker noticed an appeal of the denial of class certification in *Pendleton* to the Court of Appeals for the Fourth Circuit. However, Parker's appeal in *Pendleton* was not timely, and on July 17, 1981 the Fourth Circuit issued an Order dismissing that appeal.

SUMMARY OF ARGUMENT

I. In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 553 (1974), this Court held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to *intervene* after the court has found the suit inappropriate for class action status." (Emphasis added). In the present case, the Fourth Circuit has established a rule which extends the benefit of *American Pipe* tolling to putative class members who *file a new suit* based on a cause of action asserted in the class suit.

The Fourth Circuit tolling rule is not supported by any decision of this Court. Indeed, the circuit courts which have directly addressed the question of tolling to allow putative class members to file separate suits have uniformly rejected that proposition. Thus, the Fourth Circuit rule lacks authoritative support.

II. The Fourth Circuit rule should also be rejected because it improperly adopts the language of the *Ameri-*

can Pipe rule and mechanically applies it without any consideration of the underlying circumstances or purposes which originally prompted this Court to fashion that rule. Correctly analyzed, the *American Pipe* tolling doctrine was formulated for the very limited purpose of effectuating the objectives of Rule 23—efficiency and economy in litigation. However, the operation of the Fourth Circuit rule actually disserves these objectives. More importantly, *American Pipe* tolling was not intended to inure to the benefit of individual, private litigants. Consequently, the Fourth Circuit rule is an incorrect application and extension of *American Pipe*.

III. This Court has consistently recognized the importance of statutes of limitation as a means of protecting defendants from stale claims and assuring that faded memories and lost evidence will not unduly impair the fair disposition of lawsuits. While federal courts have the inherent power to toll the statutory period for the commencement of lawsuits, such power is used sparingly and only when consistent with legislative purpose. In the present case, Respondent Parker, having filed his own suit almost two years after his receipt of the ninety-day right-to-sue notice, then chose to intervene in the *Pendleton* class suit. Since neither the language nor the purpose of Title VII authorizes a tolling of the ninety-day period to allow Parker's belated suit, there is no basis for the tolling accorded by the present Fourth Circuit rule. Moreover, because Parker obtained the benefit of *United Airlines* tolling and became a party intervenor in the *Pendleton* case, there is no inequity in rejecting his untimely private suit.

On a larger scale, the operation of the Fourth Circuit tolling rule will have the practical effect of judicially extending statutes of repose for periods of time far beyond what legislatures have prescribed. Such extensions will be substantial and will be automatically available to all individuals who are within the scope of a civil complaint brought as a class action. Thus, the Fourth Cir-

cuit tolling rule will significantly modify a wide range of statutes and thereby intrude upon legislative prerogative.

IV. Unlike the 180-day period for filing an EEOC charge, the ninety-day period for commencing a Title VII lawsuit is a prerequisite to the jurisdiction of the court. Whereas the 180-day period is measured from the date of the wrong, and as noted in *Zipes v. Trans World Airlines*, —— U.S. ——, 102 S.Ct. 1127, 1132 (1982), is more like a statute of limitation, the ninety-day period begins to run only after the charging party/plaintiff has begun the adjudicatory process and is aware of his rights. Thus, the ninety-day period is more closely analogous to the statutory time period for obtaining federal appellate jurisdiction. Therefore, the present Fourth Circuit rule is inapplicable because the ninety-day period is jurisdictional, and not a statute of limitation.

ARGUMENT

I. THE FOURTH CIRCUIT RULE EXTENDING THE *AMERICAN PIPE* TOLLING DOCTRINE IS NOT SUPPORTED BY PRECEDENT.

The Fourth Circuit has adopted a rule under which "the pendency of a putative class action tolls the running of limitations for members of the putative class both for purposes of intervention *and the filing of a new suit* based upon a cause of action embraced within the putative class action until certification of the class is denied." (Petition for Cert. at 7a) (emphasis added). As noted in its opinion, this rule is based primarily upon the Fourth Circuit's interpretation of this Court's decision in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). Petitioner respectfully submits that the Fourth Circuit's reading of *American Pipe* is incorrect, and that the running of limitations is tolled for members of a putative class only for purposes of intervening in the proposed class suit.

A. The *American Pipe* Rule Clearly and Specifically Restricts Tolling to Timely Intervention.

In *American Pipe*, this Court considered a case involving a proposed class action antitrust suit filed by the State of Utah eleven days before the running of the statute of limitations. The trial court found that the suit could not be maintained as a class action because there was insufficient numerosity under Rule 23(a)(1) of the Federal Rules of Civil Procedure to warrant class treatment, even though the remaining prerequisites for class action [commonality, 23(a)(2); typicality, 23(a)(3); and adequacy of representation, 23(a)(4)] were apparently satisfied. Eight days after denial of class certification and after limitations had run, more than sixty local government bodies, who claimed to be members of the proposed Utah class action, moved to intervene as plaintiffs in Utah's action. However, the district court denied the intervention motion, because it determined that the limitations period under the Clayton Act had expired as to each of the local government bodies. On appeal, the Ninth Circuit reversed, concluding that permissive intervention should have been granted. *See* 414 U.S. at 541-45.

This Court affirmed the Ninth Circuit's decision and announced the controlling rule:

> [w]e hold that in this posture, at least where class action status had been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 552-53. In the subsequent case of *United Airlines, Inc. v. McDonald*, this Court reaffirmed its *American Pipe* rule restricting the application of tolling to timely intervention. 432 U.S. 385, 391-96 (1977). In

United Airlines, however, this Court found that there was a tolling of limitations even after final judgment in favor of putative class members who intervened in a Title VII sex discrimination suit, but only for the narrow purpose of appealing the denial of class certification. *Id.* Thus, this Court has clearly and consistently restricted the tolling of limitations to situations where putative class members sought to intervene in the proposed class action.

Of the circuit courts which have directly decided the question of whether *American Pipe* tolling extends to the filing of new private suits, only the Fourth Circuit, in its opinion below, has adopted such an extension. In *Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2d Cir. 1977), the Second Circuit rejected a plaintiff's effort to rely upon the tolling allowed in *American Pipe* in order to save his separate, individual suit from the bar of limitations. In refusing to extend the tolling doctrine, that court stated that "[o]f especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied." *Id.* at 783. (Emphasis original). Similarly, in *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the Second Circuit, citing *Arneil v. Ramsey*, found that "[a]ppellant's argument that this reprieve [*American Pipe* tolling] should be extended to class members who file separate suits after the class action has been terminated and the statute of limitation has expired is completely without merit."

More recently, in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3320 (U.S. Oct. 12, 1982) (No. 82-650), the Ninth Circuit refused to apply *American Pipe* tolling for the benefit of a separate, private suit. The *Pavlak* Court reasoned that:

> [i]f a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify. We

> think that in this instance the plaintiff should determine either to abide by the class certification motion, and file for intervention if it fails, or, on the other hand, commence an independent suit at the outset. Thus, the potential class member can either opt out and begin his own action within the relevant limitations period, or do nothing, in which case he will be bound by the results of the litigation. If, as here, the latter course is taken and class certification is denied, principles of equity give the putative class members a chance to intervene in the suit, thereby approximating the status quo ante. These equitable principles do not extend to permit the plaintiff to take advantage of the alternative of a separate action after the limitations period has expired.

Id. at 620. Thus, there is no direct appellate support [1] for the Fourth Circuit's present rule. At the same time, there is no clear line of decision in the district courts.[2] Therefore, the weight of authority runs counter to the rule adopted by the Fourth Circuit.

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[1] Dicta in other circuit opinions may support the Fourth Circuit's extension of the *American Pipe* tolling doctrine. *See, e.g., Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1977), *vacated*, 445 U.S. 940 (1980); *Sanders v. John Nuveen & Co.*, 524 F.2d 1064, 1074 n.28 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 929 (1976). *But see, e.g., Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Jefferson v. H.K. Porter Co.*, 648 F.2d 337, 339 (5th Cir. 1981).

[2] *See, e.g., Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979) (tolling for separate suit); *Green v. United States Steel Corp.*, 481 F.Supp. 295, 299-300 (E.D. Pa. 1979) (tolling for separate suit); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978) (tolling for separate suit). *But see, e.g., Parker v. Crown, Cork & Seal Co.*, (Petition for Cert. 8a, 13a-16a) (no tolling for separate suit); *Gluck v. Amicor, Inc.*, 487 F.Supp. 608, 614-15 (S.D.N.Y. 1980) (no tolling for separate suit); *Sanders v. Faraday Laboratories, Inc.*, 82 F.R.D. 99, 103 (E.D.N.Y. 1979) (no tolling for separate suit).

B. The Authorities Relied Upon by the Fourth Circuit Do Not Support its Present Rule.

In support of its expansion of the *American Pipe* tolling doctrine to include the filing of a new suit, the Fourth Circuit relied upon a footnote in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). (Petition for Cert. at 4a-5a). That footnote stated:

> [p]etitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Eisen, 417 U.S. at 176 n.13 (1974). For the following reasons, the text of this footnote should not be viewed as authority for the present rule.

First, the language of the *Eisen* footnote should not be construed as reflecting the *American Pipe* holding. *American Pipe* plainly restricts the operation of the tolling doctrine to purported class members "who make timely motions to intervene." [3] 414 U.S. at 552-53. Indeed, the critical language in the *Eisen* footnote appears to be only

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[3] An additional constraint set forth in *American Pipe* limits tolling to cases "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable . . . .'" 414 U.S. at 552-53. In *Pendleton*, the District Court denied class certification not only for lack of numerosity, 23(a)(1), but also for lack of typicality, 23(a)(3), and for lack of adequate representation, 23(a)(4). (App. B to Petitioner's Brief at 9a-17a). A narrow reading of *American Pipe* therefore precludes Parker from obtaining the benefit of a tolling of limitations either for intervention or for the filing of his separate suit. *But see Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1095-98 (3d Cir. 1975); *McCarthy v. Kleindienst*, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977).

a portion of a sentence taken from the text of the *American Pipe* opinion.[4]

Second, the particular facts and circumstances underlying the *Eisen* decision clearly demonstrate that the footnote language should not be controlling in the present case. In *Eisen*, a Rule 23(b)(3) class action was certified, and the principal issue was whether notice to the individual class members was mandatory. 417 U.S. at 173. In concluding that such notice was required, this Court also indicated that members who opt out of a certified class might, in a manner consistent with *American Pipe*, obtain the benefit of a tolling of limitations. *Id.* at 176 n.13. Thus, read in its proper context, the *Eisen* footnote does not provide support for the Fourth Circuit's extension of the *American Pipe* tolling doctrine. *See Pavlak v. Church*, 681 F.2d at 620-21.

A third reason why the *Eisen* footnote is not an authoritative basis for the Fourth Circuit's extension of the *American Pipe* tolling doctrine is the fact that *Eisen* was not even cited in this Court's subsequent decision in *United Airlines v. McDonald*, 432 U.S. 385. There can be little doubt that if the *Eisen* footnote had been meant to have the persuasive force attributed to it by the Fourth Circuit, surely it would have controlled, or at least would have been cited in support of the modest extension of

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[4] The full sentence in *American Pipe*, from which the *Eisen* footnote was apparently taken, is in turn, followed by a footnote which states:

> [t]he Advisory Committee's Note on Proposed Rule 23 observes on the issue resolved here only that the question 'whether the *intervenors* in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the laws governing . . . limitations as they apply in particular contexts.' 28 U.S.C. App., n. 7767; 39 F.R.D., at 104.

American Pipe, 414 U.S. at 554 n.24 (emphasis added).

American Pipe established by a divided Court in *United Airlines*. Therefore it is submitted that the *Eisen* footnote is simply not relevant to a determination of the present issue.

In its opinion below, the Fourth Circuit suggested that *Susman v. Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980), and *In re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980), "stated the tolling rule broadly enough to include new suits as well as motions to intervene in the aborted class action." (Petition for Cert. at 5a-6a). A careful examination of these cases does not indicate the support suggested by the Fourth Circuit. In *Susman*, the circuit court reversed the trial court's holding that a putative class action was moot, and noted in passing that the statute of limitations "may be tolled" for the benefit of individual members of the proposed class. 587 F.2d at 869-70. Similarly, in *Fine Paper*, the circuit court merely observed that "the statute of limitations may be tolled" during the pendency of a determination of class action status. 632 F.2d at 1087. Nothing in *Susman* or *Fine Paper* states or implies that such tolling is available to putative class members instituting their own separate suits. Thus, the Fourth Circuit's present rule lacks authoritative support in the case law.

II. THE *AMERICAN PIPE* TOLLING RULE WAS ESTABLISHED TO EFFECTUATE THE PURPOSES OF RULE 23 AND NOT TO FURTHER THE INTERESTS OF PRIVATE LITIGANTS.

There can be no question that the tolling rule adopted by the Fourth Circuit is for the singular and private advantage of individuals who, by circumstance, happen to fall within the scope of a putative class as described in a civil complaint. Under the Fourth Circuit rule, a qualifying individual automatically obtains an extension of the applicable statute of limitation for purposes of instituting his own private cause of action. However, this

benefit of tolling of limitations does nothing to advance the broad interests of the putative class from whose ranks the benefited private litigant arose. Rather, the Fourth Circuit's tolling rule has the opposite effect of undermining and weakening the putative class by facilitating and even encouraging defections through the commencement of private suits. Because the Fourth Circuit rule serves only private—as opposed to class—interests, it is important to consider this Court's underlying purpose in fashioning the *American Pipe* tolling doctrine, and then to determine whether the Fourth Circuit rule is a logical and consistent extension of that purpose.

A. The *American Pipe* Tolling Rule was Established for the Narrow Purpose of Preserving the Effectiveness of Rule 23.

In *American Pipe* the issue before this Court was whether the running of the applicable statute of limitation was tolled upon the commencement of the original class suit so that prospective members of a class, which had been denied class status, could intervene in the remaining private suit. This Court began its analysis of the issue with a review of the history of Rule 23, and in particular, its recent predecessor, the so-called "spurious" class action. Noting the serious weaknesses in that former rule, this Court observed:

> [a] recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called 'one-way

> intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.

414 U.S. at 547 (footnotes omitted). As indicated, a specific purpose of the present Rule 23 was to strengthen the class as a form of action, to eliminate abuses and to prevent the class action from becoming a device for gaining private tactical advantage. Thus, the propriety of the Fourth Circuit's tolling rule must be carefully measured for conformity with this overriding purpose.

The tolling rule adopted below provides a unique tactical advantage to those litigants fortunate enough to fall within the contours of a proposed class action. Such putative class members may "sit on the sidelines" and await developments in the case. Then, depending upon circumstances, they can either remain with the putative class, intervene, or file their own private suits. Indeed, nothing would prevent them from pursuing all three courses of action at the same time, nor would the Fourth Circuit rule prohibit privately filed suits from being dismissed and the individual litigants from reappearing as class members or intervenors. In other words, a rule which permits a tolling of the running of limitations to allow putative class members to file private suits necessarily reintroduces the same opportunities for tactical maneuvering and other abuses for individual benefit, which were noted in *American Pipe* and which the present Rule 23 was designed to prevent. *See id.* at 545-50.

In contrast to the private advantage available under the Fourth Circuit rule, nothing in *American Pipe* reflects a need to advance the private interests of the mem-

bers of a putative class. Rather, *American Pipe* strongly indicates the need to subordinate the interests of private litigants to those of the class. To this end, the Court observed:

> the tolling rule we establish here is consistent both with procedures of Rule 23 and with the proper function of the limitation statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchant . . . this interpretation of the Rule is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve.

414 U.S. at 555-56. Moreover, the *American Pipe* Court wanted to be certain that an action brought under Rule 23 would advance the interests not only of the active class participants, but also of the class members who were unaware of the proceedings. *See id.* at 552. Plainly, the Court wanted to prevent a gradual erosion of a class action brought about by the exclusion of inactive or uninformed putative class members whose individual claims might otherwise be barred by the running of limitations. *See id.* at 551-52. Thus, in holding that the applicable statute of limitations was tolled for all purported class members who make timely motions to intervene after class certification is denied, the Court was responding to a specific problem which threatened to vitiate the purpose and effect of Rule 23. In this way, the *American Pipe* tolling rule evolved from circumstances and for purposes entirely unrelated to those which are advanced through the Fourth Circuit's rule.

In *United Airlines*, this Court reaffirmed and extended the *American Pipe* rule to permit a tolling of limitations to allow putative class members to intervene for the limited purpose of appealing a denial of class certification. 432 U.S. at 391-96. Here again, this Court responded to a circumstance where the running of limitations threatened to prevent a putative class member from interven-

ing in a case in which the named class representatives could no longer protect the proposed class.[5] *Id.* at 393-94. This Court concluded that intervention for the sole purpose of appealing the denial of class certification was consistent with and advanced the purposes of Rule 23. *See id.* This Court, however, took specific note of an argument by petitioner United Airlines that respondent McDonald was barred by limitations from intervening despite the tolling afforded under *American Pipe*. *Id.* at 391-92. In rejecting United Airline's argument, this Court observed:

> [t]his argument might be persuasive if the respondent had sought to intervene in order to join the named plaintiffs in litigating *her individual claim* based on the illegality of United's no-marriage rule, for she then would have occupied the same position as the intervenors in *American Pipe*. But the later motion to intervene in this case was for a wholly different purpose. That purpose was to obtain appellate review of the District Court's order denying class action status in the *Romasanta* lawsuit . . . .

Id. at 392 (emphasis added). Thus, this Court indicated that its tolling doctrine was to be used only to effectuate the broad purposes of Rule 23. More importantly, this Court strongly suggested that this tolling doctrine would not be applied where the purpose was to advance a private claim. *Id.*

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[5] In *United Airlines* a class action complaint alleging sex discrimination in violation of Title VII was filed in 1970 by Carole Romasanta. In 1972, the district court, concluding that the proposed *Romasanta* class did not satisfy the numerosity requirement of Rule 23(a)(1), denied class action status. Romasanta's individual claim (and the claims of several intervenors) were settled in 1974 and a judgment dismissing the *Romasanta* case was entered. Eighteen days after learning of the final judgment in *Romasanta*, respondent McDonald moved to intervene in that case for the purpose of appealing the 1972 order denying class certification. The district court denied McDonald's motion as untimely, but the Court of Appeals reversed. *See United Airlines*, 432 U.S. at 388-90.

In its opinion below, the Fourth Circuit did not closely examine the purpose behind the tolling doctrine articulated in *American Pipe* or *United Airlines*. Rather, the Fourth Circuit determined that an extension of that doctrine to benefit individual litigants was a logical outgrowth of *American Pipe*, and that to refuse such an extension would "exalt form over substance." (Petition for Cert. at 6a). In so doing, the Fourth Circuit implicitly assumed that no particular purpose is served by requiring intervention as a condition for obtaining *American Pipe* or *United Airlines* tolling of limitations. Petitioner submits that this assumption is faulty.

B. An Important Purpose is Served in Limiting the Tolling Doctrine to Putative Class Members who Intervene in the Proposed Class Action.

From the time that an action is "brought as a class action" the district court has the duty and broad authority to make appropriate orders governing the conduct of the action. 28 U.S.C. Rule 23(c) and (d); *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). Indeed, a denial of class certification does not automatically mean that the claims or potential claims of the putative class members have completely expired. *See United Airlines*, 432 U.S. at 393. Rule 23(c)(1) specifically provides that an order granting or denying class certification "may be altered or amended before the decision on the merits" and that subsequent events and circumstances may warrant class action status. Thus, unlike an individual suit, an action under Rule 23 is burdened with many unique problems[6] and lingering possibilities.

The duty to ensure that the interests of putative class members are protected necessarily devolves upon the district court judge, who is in the best position to evaluate

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[6] *E.g.*, subclasses and conflicting interests, adequacy of representation, approval of compromise or settlement and communications with prospective class members.

events and circumstances in the broad context of the proposed class action. However, under the Fourth Circuit rule, a denial of class certification is likely to trigger the filing of separate suits by the more informed and knowledgeable members of the proposed class whose opportunistic desertion of the class may be inimical or even fatal to the interests of the remaining members.[7] Indeed, the absence of any judicial control or regulation over the departure of putative members from the class and their filing of private suits is a substantial reason for limiting *American Pipe* tolling to class members seeking to intervene in the proposed class action.

The operation of the Fourth Circuit rule also runs counter to Rule 23's major purpose—economy and efficiency in litigation. *See American Pipe*, 414 U.S. at 553, 555-56. Separate suits by countless members of a failed class mean a "second wave" of litigation which may take place in multiple jurisdictions. Moreover, each such separate suit carries with it a full complement of discovery, court proceedings, and potentially inconsistent results. Thus, there can be no doubt that the operation of the Fourth Circuit rule imposes a far greater burden and expense on the parties and the judicial system than may result from even a multiplicity of motions for intervention in the *same proposed class action suit*. Therefore, the Fourth Circuit rule is inconsistent with the purposes of Rule 23, and there are clear and compelling reasons to restrict *American Pipe* tolling to intervention in the proposed class action.

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[7] The tolling rule adopted by the Fourth Circuit plainly permits putative class members to file their own private suits, thereby disengaging from the class action and the attendant controls of the class action trial judge. Whereas an individual seeking to intervene in a proposed class action must satisfy the requirements of Rule 24, the Fourth Circuit rule allows an individual to defect from the proposed class without condition or judicial scrutiny. This anomaly is difficult to justify because the potential for abuse or disservice to the class is undoubtedly greater where putative class members elect to abandon the class and pursue their own actions.

III. THE FOURTH CIRCUIT TOLLING RULE IS AN IMPROPER INCURSION UPON LEGISLATIVELY ENACTED STATUTES OF LIMITATION.

Statutes of limitation serve an important function in society by promoting "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Indeed,

> [t]hese enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979); *see United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965). Thus, statutes of limitation not only impose a duty of timely filing upon plaintiffs, but also confer a substantive right upon defendants.

A. Tolling of Limitations is Available Only When Consistent with Legislative Purpose.

Even though statutes of limitation are of considerable importance in the judicial scheme, this Court has recognized that federal courts have the inherent equitable power to determine that the running of such statutes of repose may be tolled "under certain circumstances not inconsistent with the legislative purpose." *American Pipe*, 414 U.S. at 559. In so doing, this Court set forth its authority to grant judicial exceptions to the legislative policy expressed in statutes of limitation. There can be little doubt, however, that this authority to exercise judicial power in derogation of statutory enactments must be exercised carefully and sparingly. Thus, in *United States v. Rutherford*, 442 U.S. 544, 551-52 (1979), the Court observed:

> [w]hen construing a statute so explicit in scope, a court must act within certain well-defined constraints. If a legislative purpose is expressed in 'plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms.' Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole. (Citations omitted).

The *Rutherford* Court, through Justice Marshall, also emphasized that:

> [u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. See *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied.

442 U.S. at 555. Therefore, to determine whether the *American Pipe* tolling doctrine should be extended to allow Parker's private suit to escape the effect of the running of the ninety-day period fixed under Title VII, it is necessary to examine the applicable statutory language, the legislative purpose and the particular circumstances of the case.

As indicated above, Parker failed to commence his private suit within the ninety-day period set forth in 42 U.S.C. § 2000e-5(f)(1). That section provides, in pertinent part, that "the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent [employer] named in the charge . . . by the person claiming to be aggrieved . . . by the alleged unlawful employment practice." *Id.* Thus, the ninety-day period for commencing a civil action is clearly set forth

in the statute. Moreover, the language of Section 2000e-5 does not provide any exception to, or provision for, the tolling of that ninety-day period. Consequently, Parker's present action is untimely.

Undeniably, Title VII serves a broad remedial purpose in combating and rectifying discrimination in the workplace. *See, e.g., Zipes v. Trans World Airlines, Inc.*, —— U.S. ——, ——, 102 S.Ct. 1127, 1135 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). With this purpose in mind, it is held that courts are to construe "with liberality" the procedural requirements of Title VII. *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978); *see Bronze Shields, Inc. v. New Jersey Dep't of Civil Service*, 667 F.2d 1074, 1081 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 3510 (1982). However, there is simply no basis to conclude that Title VII's remedial purpose or liberal construction is an all-purpose balm which cures every manner of procedural or substantive defect. In light of the fact that Congress has explicitly declared that Title VII suits be commenced within ninety days of receipt of a right-to-sue notice, it is most difficult to glean from the language of Title VII or its legislative history any support for the lengthy extension of time which the Fourth Circuit has provided to Parker.

This Court has previously considered and rejected an effort by a nonclass plaintiff to obtain a tolling of the ninety-day statutory period in order to institute a Title VII suit. In *Int'l Union of Elec., Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 231-32 (1976), a discharged employee pursued grievance arbitration procedures under her employer's collective-bargaining agreement, but failed to file a timely administrative charge of discrimination with the EEOC pursuant to 42 U.S.C. § 2000e-5(d). Consequently, her subsequent suit under Title VII was dismissed. To save her Title VII

case, the discharged employee argued that the statutory period for filing an administrative charge of discrimination with the EEOC is equitably tolled "pending completion of the grievance procedures." 429 U.S. at 237. Although this Court reversed the dismissal on other grounds, it rejected the employee's arguments for an equitable tolling. *Id.* at 236-40. The Court concluded that the statutory time limits set forth in Title VII reflect congressional purpose; therefore, they are controlling. *Id.* at 240. Even in *Zipes*, where this Court held that the 180-day period for filing an EEOC charge is not a jurisdictional prerequisite, it was carefully noted that the remedial purpose of Title VII does not negate the purpose of the 180-day filing requirement. —— U.S. at ——, 102 S.Ct. at 1135.

The particular circumstances of the present case hardly warrant a judicial tolling of limitations so that Parker may institute his separate suit nearly two years after the expiration of his ninety-day notice. Most critical is the fact that Parker made a timely motion under Rule 24(a) and (b) of the Fed. R. Civ. P. to intervene in the *Pendleton* class action for purposes of appealing the order denying class certification. By an order dated April 16, 1981, the District Court granted that motion and Parker obtained the benefit of the *United Airlines* tolling rule, and thereby became a party intervenor in the *Pendleton* case. (App. C to Petitioner's Brief at 20a). However, Parker, in his status as intervenor in the *Pendleton* case, failed to note a timely appeal of the denial of class certification. In any event, Parker made a positive election to join, and did in fact join the *Pendleton* case as a party.[8] Clearly, the equitable tolling Parker now seeks is for the exclusive purpose of enabling him to have a

[8] Since Parker has been continually represented by the same counsel who represented the class representatives in *Pendleton*, it is evident that Parker was aware of the denial of class certification in *Pendleton*. Therefore, Parker certainly could have made a timely intervention in that case and pursued his private claims as a party intervenor in accordance with *American Pipe*.

second chance to pursue his claims. It is submitted that no equitable or Title VII remedial purpose is served by adopting a rule which will enable litigants, like Parker, more than one opportunity to advance legal claims. This is particularly true where such opportunities are not uniformly available, but rather depend upon the fortuity of being a member of a proposed class described in a civil complaint.

B. The Operation of the Fourth Circuit Rule Will Substantially Undermine the Purpose and Effect of Statutes of Limitation.

The Fourth Circuit rule automatically tolls the applicable statute of limitations for all members of a putative class who are described in a civil complaint drafted by attorneys or *pro se* litigants. The nature and extent of such a proposed class, all of whose members individually benefit from an "equitable" tolling of limitations, is determined by the draftsman of the lawsuit, and not by a court. Thus, the temptation to obtain tactical advantage through misuse of the class action format and through broadly defining class membership is considerable.

The Fourth Circuit rule also does not focus upon the length, or potential length, of the tolling which may result from its operation. For example, while Rule 23(c)(1) of the Fed. R. Civ. P. directs the district court to determine "as soon as practicable" after filing whether or not a suit should be maintained as a class action, in the present case nearly two years elapsed between the filing of the complaint in *Pendleton*, and the order denying class certification in that case.[9] Thus, the workload of the court and the complexities of the class certification issues can greatly extend the period of tolling. In situations where there are successive or overlapping class ac-

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[9] The *Pendleton* suit was filed on September 15, 1978; class certification was denied in that case on September 4, 1980. (Petition for Cert. at 3a).

tions against the same defendant, tolling of limitations may continue for an extraordinary period of time. In fact, the application of the Fourth Circuit rule does not prevent a putative class member from bringing his new private suit as a class action, thereby continuing the tolling of limitations. Also, in a case where there is both a proposed plaintiff class and a proposed defendant class, the Fourth Circuit rule will create difficult problems in determining the timeliness not only of separate, private suits, but also of counterclaims and crossclaims. It is therefore submitted that the operation of the Fourth Circuit rule will cause lengthy or even indefinite tolling and thereby judicially revise legislative enactments.

IV. THE FOURTH CIRCUIT TOLLING RULE DOES NOT APPLY BECAUSE THE NINETY-DAY FILING PERIOD PRESCRIBED BY 42 U.S.C. § 2000e-5(f)(1) IS A JURISDICTIONAL PREREQUISITE AND NOT A STATUTE OF LIMITATION.

The Fourth Circuit tolling rule is inapplicable to the present case because the ninety-day filing period prescribed by 42 U.S.C. § 2000e-5(f)(1) is a jurisdictional prerequisite which should not be equitably tolled. Prior to this Court's decision in *Zipes*, —— U.S. ——, 102 S.Ct. 1127, most of the courts of appeals held that the ninety-day filing requirement was jurisdictional. *See, e.g., Archie v. Chicago Truck Drivers*, 585 F.2d 210, 214 (7th Cir. 1978); *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975); *Wong v. Bon Marche*, 508 F.2d 1249, 1250-51 (9th Cir. 1975); *Genovese v. Shell Oil Co.*, 488 F.2d 84, 85 (5th Cir. 1973) [construing the prior thirty-day filing requirement of 42 U.S.C. § 2000e-5(e)]; *Goodman v. City Products Corp.*, 425 F.2d 702, 703-04 (6th Cir. 1970) [interpreting the prior thirty-day filing requirement of 42 U.S.C. § 2000e-5(e)]. In fact, this Court in dictum has referred to the ninety-day judicial filing requirement as a jurisdictional prerequisite. *See United Airlines, Inc. v. Evans*, 431 U.S.

553, 555 n.4 (1977); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

The decision in *Zipes* does not change the law with respect to this ninety-day filing requirement. In *Zipes*, the Court specifically held that the requirement that a charge be filed with the EEOC within 180 days of the discrimination "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." —— U.S. at ——, 102 S.Ct. at 1132. However, *Zipes* did not decide the same question as to the ninety-day judicial filing period [10] and, therefore, is not controlling.

Unlike the 180-day filing period which accrues from the date of the alleged discriminatory act, the ninety-day period is triggered at a point unrelated to the accrual of the cause of action. The traditional reasons for equitable tolling, such as the defendant's fraudulent concealment of the cause of action, or the plaintiff's justifiable ignorance of the claim, are virtually nonexistent at this stage. By the time the ninety-day filing period is applicable, the plaintiff is fully aware of his cause of action, has had an administrative forum in which to prosecute his claim and has been counseled as to his rights. In fact, the plaintiff has been given a written statement which clearly sets forth the deadline for filing in federal court. (J.A. 7A). Therefore, the concern *Love v. Pullman Co.*, 404 U.S. 522, 527 (1970), expressed over "technicalities [which] are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process" is less pressing at this stage.

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[10] Courts of appeals after *Zipes* have extended *Zipes* and held that the ninety-day filing period is also not jurisdictional. *See, e.g., Gordon v. National Youth Work Alliance*, 675 F.2d 356, 359-60 (D.C. Cir. 1982); *Rice v. New England College*, 676 F.2d 9, 10 (5th Cir. 1982); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1001 (11th Cir. 1982).

Petitioner maintains that the ninety-day period is more analogous to the time limitations in 28 U.S.C. § 2107 and Rule 4(a) of the Fed. R. App. P. which prescribe that notice of appeal in a civil case must be filed within thirty days of the entry of judgment or order from which the appeal is taken. This Court has held that "[t]his 30-day time limit is 'mandatory and jurisdictional.'" *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257, 264 (1978); *see also United States v. Robinson*, 361 U.S. 220, 229 (1960); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

Congress clearly intended that the EEOC be the primary forum for investigating, conciliating and remedying Title VII violations. *See* S. Rep. No. 92-415, 92d Cong., 1st Sess. 23 (1971). Therefore, since an individual has had an opportunity to seek relief through this administrative process, the ninety-day time period for filing a federal suit, like an appeal, arises after the individual has begun the adjudicatory process, and is in no way tied to the accrual of the underlying cause of action. It is therefore submitted that the nature and extent of the tolling accorded to Parker under the Fourth Circuit rule is wholly incompatible with the jurisdictional character of the ninety-day filing requirement of Title VII.

CONCLUSION

The Judgment of the Court of Appeals for the Fourth Circuit (J.A. 13A) reversing and remanding the summary judgment of the District Court (J.A. 12A), should be reversed.

Respectfully submitted,

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December, 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. K-78-1734

RANDY PENDLETON and MARVIN ALLEN,
on behalf of themselves and all others similarly situated
Plaintiffs

vs.

CROWN, CORK & SEAL COMPANY, INC.
Defendant

COMPLAINT

Preliminary Statement

1. This is an action for declaratory, injunctive and other relief to redress the deprivation of rights secured to the plaintiffs by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, et seq.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343. This action is authorized and instituted pursuant to 42 U.S.C. § 2000e, et seq. The unlawful employment practices herein were and are being committed within the District of Maryland.

PARTIES

3. Plaintiffs, Marvin Allen and Randy Pendleton are black citizens of the United States and residents of Baltimore, Maryland.

4. Defendant Crown, Cork & Seal Company, Inc. is a New York corporation doing business in the State of Maryland where it is engaged in manufacturing cans,

closures and machinery and related activities in interstate commerce throughout the State of Maryland.

DEFINITION OF CLASS

5. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of black persons who have been, continue to be and who in the future will be denied equal employment opportunities by defendant on the grounds of race or color, in violation of Title VII of the Civil Rights Act of 1964. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claim or defenses of plaintiffs will adequately protect the interest of the class. Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole.

6. This is a proceeding for a declaratory judgment as to plaintiffs' rights, or their class rights and a preliminary and permanent injunction enjoining defendant from maintaining policies and practices of discriminating against plaintiffs and their class because of their race or color.

STATEMENT OF CLAIMS

7. Defendant Crown, Cork & Seal, Co., Inc. discriminates against blacks as a class with regard to terminations, hiring, job assignments, promotions, disciplinary actions, harassment, on-the-job training, and retaliation because they seek to enforce their civil rights, and, terms and conditions of employment.

8. Defendant has discriminated against Plaintiff Marvin Allen on the basis of his race in the following ways:

a. Plaintiff was hired by defendant in or around August, 1973;

b. Plaintiff was hired as an End Wrapper (Labor grade 6).

c. After being employed by the defendant for approximately three or four months, plaintiff noticed that defendant engaged in certain racially discriminatory employment practices and he filed a charge of discrimination with the Maryland Commission on Human Relations on 10-31-73 alleging that defendant discriminates against blacks on the basis of their race with regard to hiring, job training, promotions, terminations and terms and conditions of employment.

d. After plaintiff filed his initial charge of discrimination, the defendant retaliated against him by subjecting him to harsher disciplinary action than it subjected white employees for the same, similar or worse violations of company rules.

e. Plaintiff noticed that racial slurs, threats and abuses were written on the walls of the locker rooms and lavatories. Prior to the filing of his charge of discrimination with the Maryland Commission on Human Relations, plaintiff complained to defendant's management personnel on numerous occasions.

f. On one occasion, plaintiff was threatened by a fellow white employee with a revolver while he was under the influence of an intoxicant. The white employee was made to apologize to the plaintiff and given five days off after working the preceding weekend on overtime.

g. Shortly thereafter, plaintiff was terminated for being late returning from his lunch break. Plaintiff's termination was because of his race and in retaliation against him because he filed a charge of discrimination against the defendant.

9. Defendant terminates black employees because of their race. For the period July, 1973-April, 1975, defendant terminated forty-four (44) persons; seventy-five percent (75%) of those persons were black, yet, on the average, blacks only made up ten percent (10%) of defendant's workforce.

10. Defendant discriminated against blacks with regard to hiring in that its plant is located in the Baltimore Standard Metropolitan Statistical Area (SMSA) where approximately 22% of the experienced workforce is black, and, blacks only comprised 10% of its average workforce for the period July, 1973 to April, 1975.

11. Defendant discriminates against blacks with regard to on-the-job training and then discharges them when they fail to progress at a rate similar to white employees who have not been discriminated against with regard to on-the-job training.

12. Defendant discriminates against blacks with regard to job assignments and promotions in that black employees are assigned to lower paid, unskilled, jobs and excluded from higher paid skilled hourly positions and supervisory positions.

13. Defendant has no specific guidelines or standards to determine: a. whether a probationary employee's performance is satisfactory, b. whether an employee should be disciplined and the type of discipline. These determinations are left up to the subject judgment of an all white supervisory workforce unfettered by objective standards. This type of subjudgment has resulted in a disparate impact on black employees.

14. After hiring Plaintiff Randy Pendleton on October 2, 1973, defendant discriminated against him on the basis of his race with regard to on-the-job training and terminated him on October 6, 1973 on the basis of his race when his performance, based on the subjective

judgment of his supervisor, was alleged to be non-satisfactory.

15. Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for backpay, injunctive and a declaratory relief is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from defendant's unlawful policies and practices as set forth herein, unless enjoined by this Honorable Court.

16. As a direct and proximate result of the wrongful acts of the defendant alleged herein, plaintiffs and their class have suffered actual damages and economic losses, back pay, and other fringe benefits.

AGENCY COMPLIANCE

17. Plaintiff Randy Pendleton filed a timely charge of discrimination with EEOC and the Maryland Commission on Human Relations against the defendant alleging that he had been terminated by it because of his race, and, he received a "Notice of Right to Sue" from EEOC dated July 18, 1978 (copies attached). Reasonable cause was found to believe plaintiff was discriminated against.

18. Plaintiff Marvin Allen filed charges of discrimination with the Maryland Commission on Human Relations and EEOC alleging that defendant discriminates against blacks because of their race with regard to hiring, job training, promotions, terminations and terms and conditions of employment. Plaintiff Allen further charged defendant with retaliating against him because he filed charges of discrimination against it. He received a Notice of Right to Sue from EEOC dated June 19, 1978 (copies attached).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and the class they represent respectfully pray that this Court:

1. Grant plaintiffs and the class they represent a declaratory judgment that the actions of defendant complained of herein, violate the rights of plaintiffs and the class they represent guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*;

2. Grant plaintiffs and the class they represent a preliminary and permanent injunction prohibiting the defendant, its agents, successors, employees, attorneys and those acting in concert with it from engaging in the policies and practices complained of herein in violation of Title VII of the 1964 Civil Rights Act;

3. Grant plaintiffs and the class they represent such other and further relief as may be necessary and proper, including promotions, reinstatement and back pay to the plaintiff and the member of the class shown to be entitled to such relief;

4. Award plaintiffs and the class they represent the costs of this action, together with reasonable attorneys' fees as provided in § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (5) (k).

Respectfully submitted,

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-78-1734

RANDY PENDLETON and MARVIN ALLEN,
on behalf of themselves and all others similarly situated,
Plaintiffs

vs.

CROWN, CORK & SEAL COMPANY, INC.,
Defendant

MEMORANDUM AND ORDER

Plaintiffs filed this suit on September 18, 1978, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging racially discriminatory employment practices by defendant company. After substantial discovery, plaintiffs moved to certify this case as a class action under Rule 23(b)(2), F.R.Civ.P. Plaintiff Pendleton requested that he be permitted to represent a class of black employees who, on or after January 12, 1973, could have filed a charge of racially discriminatory termination. Plaintiff Allen sought to represent a class of black employees who, on or after March 31, 1973, could have filed charges of racially discriminatory termination, job assignment, retaliation and harassment.

On July 13, 1979, this court held a hearing and ruled on some, but not all, of the class certification issues. Since over a year has passed since the hearing, the court has decided to reiterate its previous rulings as well as now rule on the questions reserved.

I. RULE 23 REQUIREMENTS

In *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405-06 (1977), the Supreme Court dispelled authori-

tatively any notion that Title VII cases were to be treated necessarily as class actions; they must meet all the requirements of Rule 23 in order to justify class certification. *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312 (4th Cir. 1978).

Subdivision (a) of Rule 23 establishes prerequisites to the maintenance of any class action: the putative class must be so numerous as to make joinder of all members impracticable; there must be questions of law or fact common to the class; the claims of the representative parties concerning the issues must be typical of the class; and there must be assurance that the representatives will adequately pursue and protect the class interests. These requirements are mandatory, and the moving party bears the burden of establishing that a class exists as well as of showing who would be included in the class. *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d 699, 706-07 (4th Cir. 1976); *Poindexter v. Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972).

The timely filing of a Title VII discrimination charge with the appropriate agency is a prerequisite to a private federal court action. *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1329 (4th Cir. 1976). In addition, the scope of the judicial complaint is limited to the allegations contained in the charge itself and those that are developed in the course of a reasonable administrative investigation of that charge. *King v. Seaboard Coast Line R. Co.*, 538 F.2d 581, 583 (4th Cir. 1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465-66 (5th Cir. 1970). This rule was established to accommodate conflicting statutory policies: Title VII's remedial goal of protecting those least able to assert their rights and the Act's conciliation mechanism designed to resolve differences through settlement rather than litigation. *See Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184, 1188-89 (D.Md. 1977).

II. PLAINTIFF PENDLETON

Plaintiff Pendleton's motion to represent *all* black employees terminated on or after January 12, 1973, was denied at the hearing of July 13, 1979, for two reasons: his claims were not typical of those of the putative class and he was an inadequate class representative.

The facts relied on by the court in reaching this determination are undisputed. Pendleton was employed by defendant for only four and one-half days (October 2, 1973-October 6, 1973). Thus, under Article XI, Section Six of the collective bargaining agreement between defendant and its plant union, Pendleton was a *probationary* employee rather than one with seniority rights. (Paper No. 51, Exhibit A). As a probationary employee, Pendleton's claims cannot reasonably be said to be typical of those of defendant's "permanent" employees, for he does not "possess the same interests and suffer the same injury as the class members [he seeks] to represent." *Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 101 (4th Cir.), *cert. denied*, 100 S.Ct. 271 (1979). With respect to adequacy of representation, Pendleton's inappropriateness as a class representative is equally apparent. There is simply an insufficient nexus between his interests as a probationary employee and those of black employees with seniority rights under the collective bargaining agreement. *See Gibson v. Local 40 Super Cargoes and Checkers, ILWU*, 543 F.2d 1259, 1264-65 (9th Cir. 1976).

The question whether Pendleton could represent a class of black probationary employees was reserved at the close of the July 13, 1979, hearing. The parties have submitted additional memoranda and the issue is ready for determination.

Upon reviewing the materials filed by the parties and the evidence adduced at the hearing, the court concludes that class certification regarding Pendleton should be denied because plaintiffs have failed to satisfy their burden as to numerosity and adequacy of representation.

Plaintiffs, in their supplemental memorandum (Paper No. 53), list thirty-four (34) black probationary employees they identify as members of Pendleton's proposed class. No supporting documentation was provided. Defendant's supplemental memorandum (Paper No. 54), contends that twenty (20) is the correct maximum number of putative class members. In contrast to plaintiffs' scanty showing, defendant has supported its calculation with extensive documentation that plaintiffs have not attempted to refute. Thus, based on all materials of record, the court finds that twenty (20) is the maximum number of Pendleton's proposed class.

In addressing the numerosity issue, the court is mindful of the Fourth Circuit's comments in *Kelly v. Norfolk & Western Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978).

> "There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied. The issue is one primarily for the District Court, to be resolved in light of the facts and circumstances of the particular case."

Thus, federal decisions granting or denying class certification on the basis of specific numbers are of little guidance. *See* cases collected in 3B *Moore's Federal Practice* ¶ 23.05 [1] (1979 & 1979-1980 Cum. Supp.). The number of putative class members must be linked to whether, under the circumstances of the case, the moving party has demonstrated that joinder is indeed impracticable. *Kelly v. Norfolk & Western Ry. Co.*, 584 F.2d at 35; *Wilburn v. Steamship Trade Assn. of Baltimore, Inc.*, 376 F. Supp. 1228, 1233 (D. Md. 1974).

Here, twenty (20) is the upper limit of plaintiffs' proposed class. Although this is arguably a sufficient number in general, plaintiffs have not shown why it would be impracticable to join any of the potential litigants who wished to intervene. Moreover, defendant has submitted information drawn from the personnel cards of the indi-

viduals listed in plaintiffs' memorandum indicating that all proposed class members live in the Baltimore City area. (Paper No. 54, Exhibit C). This information has not been challenged by plaintiffs. In light of plaintiffs' failure to produce persuasive evidence of any nature demonstrating the impracticability of joinder of the twenty (20) putative class members, the court finds that they have not carried their burden respecting numerosity.

The "adequacy" requirement of Rule 23 is perhaps its most important prerequisite because any judgment in this type of class action would bind absent class members. *See, e.g., Linder v. Litton Systems, Inc.*, 81 F.R.D. 14, 19 (D.Md. 1978); *Gill v. Monroe County Dept. of Social Services*, 79 F.R.D. 316, 326-27 (W.D.N.Y. 1978); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 23, 42-44 (N.D. Cal. 1977). *See generally Hansberry v Lee*, 311 U.S. 32, 41-42 (1940). Since the adequacy of a particular plaintiff is essentially a factual determination, the court has reviewed extensively the deposition of Pendleton taken by defendant on January 23, 1979. (Paper No. 37).

Pendleton was employed by defendant for only four and one-half days, nearly seven years ago. The court recognizes, however, that no terminated probationary employee could be expected to have acquired detailed information concerning defendant's practices and operations. Nevertheless, Pendleton's deposition makes it abundantly clear that he is wholly unfamiliar with the employment situation at defendant's plant and had virtually no contact with the members of the proposed class. A few examples underline vividly Pendleton's inadequacy as a class representative for even probationary employees: he did not know the name of the plant union and was not aware of the provisions of the collective bargaining agreement (Paper No. 37 at 90-91); he was not familiar with the grievance system (Paper No. 37 at 92); he had no knowledge of defendant's layoff system, attendance rules, bidding procedures, seniority system or sick leave procedures

(Paper No. 37 at 93-94); he had no knowledge of defendant's disciplinary system or suspension and discharge procedures (Paper No. 37 at 95-96); aside from a brief conversation with plaintiff Allen, he never communicated with any other black or minority employees or union representatives (Paper No. 37 at 96-101). Outside of conclusory statements in their motion for class certification, plaintiffs have not put forth concrete reasons as to why Pendleton would be an adequate representative.

In light of Pendleton's attenuated ties to the employment setting, *see, e.g., Consor v. Occidental Life Insurance Co.*, 19 E.P.D. ¶ 9162 at 7029-30 (N.D. Tex. 1979); *Rosendaul v. Garrett Freight Lines, Inc.*, 19 E.P.D. ¶ 9119 at 6826 (D. Idaho 1979); *Linder v. Litton Systems, Inc.*, 81 F.R.D. at 19-22; *Greene v. Brown*, 451 F. Supp. 1266, 1275 (E.D. Va. 1978), the court finds that Pendleton is not an adequate class representative.

III. PLAINTIFF ALLEN

At the close of the hearing on July 13, 1979, the court denied Allen's motion to represent a class of black employees on the issues of termination, job assignment, and retaliation. The question whether Allen could represent a class on the issue of harassment was reserved. Plaintiffs have filed a motion for reconsideration on the issue of termination and defendant has filed a response.

A. *Job Assignment*

In denying class certification on this issue, the court found that not only had Allen failed to file a specific administrative charge relating to job assignment but also that he was not, at the time of hiring, qualified for a skilled position at defendant's plant. Even assuming that the issue of job assignment is properly before this court, *see King v. Seaboard Coast Line R. Co.*, 538 F.2d at 583; *Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. at 1187-89,

1133, Allen admitted in his testimony at the hearing of July 13, 1979, that he was not qualified to be hired for a skilled job. Moreover, although there is some dispute as to whether Allen was "promised" to be given a skilled job at some future time, it is undisputed that Allen never requested a specific job either orally or in his application papers. *See Queen v. Dresser Industries, Inc.*, 456 F. Supp. 257, 263 (D. Md. 1978), *aff'd* 609 F.2d 509 (4th Cir. 1979).

Allen further contended that he was discriminated against with respect to job training for skilled jobs. The evidence of record, however, shows that such training was governed by the collective bargaining agreement between defendant and its plant union. Under that agreement when there were openings for skilled jobs, defendant was required to post the jobs for bidding by employees with seniority rights. Only if no such qualified employee could be found was defendant permitted to offer the job to others. Yet, while Allen testified that he was aware of the posting procedure he offered no evidence indicating that he ever requested a posted skilled job. In light of the above, the court concluded that Allen's claims were not typical of the class he sought to represent and that, in any event, he would be an inadequate class representative. *East Texas Motor Freight v. Rodriguez*, 431 U.S. at 403-04.

B. *Retaliation*

The court also denied Allen's motion to represent a class of black employees on the issue of retaliation. Claims under 42 U.S.C. § 2000e-3(a) are generally personal in nature. They do not lend themselves readily to class treatment since they usually involve facts and circumstances unique to the claim of the person against whom the retaliation is directed.

The basis of Allen's retaliation claim involves his amended EEOC complaint of September 3, 1974, in which

he alleged that he was dealt with more harshly than a white employee upon his returning to work late from lunch. The next day, September 4, 1974, Allen was terminated. Even assuming that Allen will himself be able to show the filing of an EEOC complaint and the subsequent, causally related termination, plaintiffs have made no showing that there exists a class of black employees similarly aggrieved. Thus, plaintiffs failed to carry their burden regarding numerosity and typicality, and class certification was properly denied.

C. *Termination*

In his October 31, 1973, charge filed with the Maryland Commission on Human Relations (MCHR), Allen complained of discriminatory termination policies by defendant. Such a charge, however, was premature because Allen was not terminated until September 4, 1974. At the close of the hearing on July 13, 1979, the court denied plaintiffs' motion for class certification on the issue of termination, finding that Allen's claim was at best part of his reprisal claim because he did not file an administrative charge of discriminatory termination subsequent to his firing on September 4, 1974.

Plaintiffs advance three arguments in support of their motion for reconsideration. First, plaintiffs contend that Allen's EEOC affidavit of April 7, 1975, constitutes an amendment to his earlier charges. Second, plaintiffs assert that a reasonable EEOC investigation of the allegations contained in his earlier charges would have revealed a discriminatory termination claim. Finally, plaintiffs contend that Allen should be able to raise the termination issue in this proceeding under a "like and related" theory because there was no EEOC investigation of the earlier charges.

In support of their first contention, that Allen's EEOC affidavit of April 7, 1975, constitutes an "amendment," plaintiffs cite several cases in this District for the prop-

osition that letters from claimants to the EEOC may constitute legally sufficient administrative charges. The court has no quarrel with this general proposition, but the cases relied on by plaintiffs do not support their instant theory. In *EEOC v. Fidelity & Guaranty Co.*, 420 F. Supp. 244, 248 (D. Md. 1976), Judge Murray ruled that an unsworn letter constituted a timely filed charge because it "clearly identified the parties and described the practices complained of." Similarly, in *EEOC v. Raymond Metal Products Co.*, 385 F. Supp. 907, 913 (D. Md. 1974), Chief Judge Northrop ruled that the plaintiff's letters were "sufficiently precise to constitute an initial filing of the charge." At issue in both those cases was primarily whether the EEOC's jurisdiction had been invoked within the statutory period.

The instant case does not concern whether Allen filed a charge within the limitations period. Rather, plaintiffs' contention is that Allen's EEOC affidavit of April 7, 1975, should be construed as an amendment to his earlier charges and therefore bring the issue of termination within the scope of the administrative proceeding.

Having carefully reviewed this affidavit and having given it a liberal construction, the court concludes that it does not constitute an amendment to Allen's earlier charges such that the issue of termination is properly before the court. The word "termination" is mentioned only once and in the context of Allen's recollection of what his supervisor said the penalty would be for his late return to work on August 24, 1974. Nowhere in the affidavit does Allen state that he was the subject of a discriminatory termination or that others were so discriminated against. Also supportive of this conclusion is the fact that the EEOC did not treat Allen's affidavit as a charge. While defendant was served with notice of Allen's charges of October 31, 1973, and September 3, 1974, the EEOC did not notify defendant of the affidavit. (Paper No. 57, Exhibits A & B).

Plaintiffs' second contention is that even if Allen did not file a charge of discriminatory termination, an EEOC investigation of his earlier charges would have disclosed such discrimination. In support of this assertion, plaintiffs rely on *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976). In that case the court held:

> "[T]he original charge is sufficient to support an action by the EEOC as well as a civil suit under the Act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act."

Id. at 366 (footnote omitted).

As the above quoted language indicates, plaintiffs' reliance on *EEOC v. General Electric Co., supra*, is misplaced. No showing has been made that an EEOC investigation revealed a claim of discriminatory termination or that one was the subject of conciliation.

Plaintiffs' final argument is that because there was no EEOC investigation, plaintiffs should be able to raise discriminatory termination as a "like and related" claim along with those asserted in Allen's charges of October 31, 1973, and September 3, 1974. The contention that there was no EEOC investigation is unsupported and simply does not square with the evidence of record. Defendant has submitted letters, one from EEOC dated October 3, 1974, indicating plainly that an administrative investigation of Allen's charges would be instituted (Paper No. 57, Exhibits C & D). Plaintiffs have submitted nothing to refute this evidence.

In sum, the court concludes that Allen may not represent a class of black employees on the issue of discriminatory termination. Plaintiffs have not only failed to satisfy the Rule 23 requirements of numerosity and typicality on this issue, but have also not demonstrated that the termination issue is properly before the court.

D. *Harassment*

At the close of the hearing on July 13, 1979, the court reserved its ruling on whether Allen could represent a class of black employees on the issue of harassment. Based on Allen's charges of October 31, 1973, and September 3, 1974, the court concludes that they can fairly be read as harassment charges, although classified as reprisal charges by the EEOC, and shall treat them as such for the purposes of this motion.

Allen's harassment claim is twofold: he claims to have been treated more harshly because of his race and because he has filed charges with MCHR and the EEOC. After reviewing the record and the evidence at the hearing, the court concludes that plaintiffs have failed to carry their burden under Rule 23(a). Except for some nonspecific allegations in Allen's EEOC affidavit of April 7, 1975, plaintiffs have produced little suggesting the existence of a class so numerous that joinder is impracticable. In addition, plaintiffs have not demonstrated that Allen's harassment claims are typical of claims held by the putative class. *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d at 706-07.

It is, therefore, this 4th day of September, 1980, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion for class certification is DENIED.

2. That plaintiffs' motion for reconsideration of the court's denial of class certification is DENIED.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-78-1734

RANDY PENDLETON and MARVIN ALLEN

v.

CROWN, CORK & SEAL CO., INC.

MEMORANDUM AND ORDER

Theodore Parker has moved to intervene in this case, pursuant to Rule 24, Fed. R. Civ. P., for the purpose of appealing the court's denial of the class certification motion filed by the named plaintiffs. The defendant, Crown, Cork & Seal Co., Inc. (Crown), has filed a memorandum opposing Parker's motion. Having reviewed the parties' memoranda, as well as the record in this case, the court concludes that no hearing is necessary, Local Rule 6(E), and that Parker's motion should be granted.

Plaintiffs Pendleton and Allen filed their complaint in this case on September 15, 1978, as a class action, alleging discriminatory employment practices by Crown in violation of Title VII. After substantial discovery, the plaintiffs filed a motion for class certification. On July 13, 1979, the court held a hearing and ruled on some, but not all, of the class certification issues. At the close of the July 13, 1979 hearing, the court denied plaintiff Pendleton's motion to represent a class of all black employees terminated on or after January 12, 1973. The court also denied plaintiff Allen's motion to represent a class of black employees on the issues of termination, job assignment, and retaliation. By Memorandum and Order dated September 4, 1980, the court reiterated its prior rulings and denied plaintiff Pendleton's motion to represent black probationary em-

ployees on the issue of termination, and denied plaintiff Allen's motion to represent a class of black employees on the issue of harassment.

On October 28, 1980, Parker filed an individual Title VII action alleging racially discriminatory job assignments, promotions and layoffs by defendant Crown. *See Theodore Parker v. Crown, Cork & Seal Co., Inc.*, Civil Action No. M-80-2839. On February 26, 1981, a settlement was reached between Crown and the named plaintiffs, and the court ordered this case dismissed with prejudice. On March 30, 1981, Parker filed his motion to intervene for the purpose of appealing the denial of class certification in this case.

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392-96 (1977), the Supreme Court held that when a member of a putative class files a motion to intervene after judgment in order to obtain appellate review of a District Court order denying class certification, the motion is timely if it is filed within the time allowed by Rule 4(a), Fed. R. App. P., for filing a notice of appeal.

An examination of the allegations in Parker's protective lawsuit indicates that he was a member of several of the classes proposed by the named plaintiffs. Final judgment was entered on February 26, 1981, when the court approved the settlement between Crown and the named plaintiffs and dismissed the case with prejudice. Since Parker's motion to intervene was filed on March 30, 1981, it is timely under Rule 4(a), Fed. R. App. P. *See* Rule 26(a), Fed. R. App. P. (computation of time).

Defendant contends, however, that Parker is somehow estopped or without standing to seek appellate review of the denial of class status because he has filed his own Title VII suit. The court disagrees. Parker's protective lawsuit was filed *after* the court's Memorandum and Order of September 4, 1980, disposing finally of all class certification issues. In addition, there is no formal "opt out"

provision under Rule 23(b)(2), the present type of case, as there is under Rule 23(b)(3). Moreover, the position taken by Crown is contrary to the policy considerations outlined in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

Although the court considers Parker's prospective appeal to be wholly without merit, under the rule established in *McDonald*, Parker's motion is timely and, therefore, must be granted.

Accordingly, it is this 16th day of April, 1981, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Theodore Parker to intervene in this action for the purpose of appealing this court's denial of class certification is GRANTED.

2. The Clerk shall forward a copy of this Memorandum and Order to counsel for the parties.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge